UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ARISTA RECORDS, LLC. *et al.*,

Plaintiffs,

v. 06 Civ. 5936 (KMW)

LIME WIRE, LLC, et al.,

Defendants.

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April 26, 2011
10:18 a.m.

Before:

HON. KIMBA M. WOOD,

District Judge

APPEARANCES

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(Case called)

MR. POMERANTZ: Good morning, your Honor. Glenn Pomerantz on behalf of the plaintiffs, and with me today is Kelly Klaus, Blanca Young and Hailyn Chen.

THE COURT: Good morning.

MR. BAIO: Good morning, your Honor. Joseph Baio I'm here with Tariq Mundiya, John Oller and Katharine Monin.

THE COURT: Okay. Thank you very much.

My deputy has passed out certain instructions relating to courtroom procedures and jury selection. You may not have had a chance to read them yet, you don't need to read them yet. You have also been handed copies of draft preliminary injunctions to the jury and voir dire. I stress that they are draft, they're really discussion documents.

I already have your views on voir dire. I have looked carefully over voir dire in other cases. I think that what I have strikes the balance of fairness but I'm ready to hear you on any prejudice you think my instructions or questions would cause or failure to ask or instruct with cause.

I conduct the voir dire myself with counsel, of course, and parties if they wish. I do a lot of the questioning at side bar. I have found that jurors here are generally more comfortable at side bar. They often don't know what their answers are going to be to a question, they may want time to think about it, and they certainly don't want to expose

their views to everyone in the courtroom before they've thought about some of the questions.

If counsel want me to ask follow up questions during voir dire I ask the juror to go about 12 feet away and I hear what counsel's questions are and then I tell you whether I'm going to ask the question or not. I ask that counsel not speak at all to jurors without my giving the go ahead.

Before getting into the substantive agenda today, I would like to ask that each side bring your two lead counsel into the robing room so that I can discuss a few matters briefly with you and then I will come back out and we will get to our agenda for the day.

(Discussion off record)

THE COURT: Counsel, have you had enough time to look over the voir dire to give me a quick reaction on any points that you think are critical?

MR. KLAUS: Good morning, your Honor.

THE COURT: Mr. Klaus.

MR. KLAUS: Just very briefly, the question no. 23.

THE COURT: Wait one second.

MR. KLAUS: Sorry.

THE COURT: Yes, 23.

MR. KLAUS: Your Honor, the question did not -- it asks whether the prospective juror or a family member has used one of the various services recently. At least with respect to

the legal services, the services, it doesn't ask the follow-up question of when did that last using it and we didn't know if that -- if your Honor was intending to excuse the jurors who answered yes for cause then there is no need to ask the follow-up question.

THE COURT: I'm disinclined at this point to view any use as disqualifying in and of itself, so I will ask relevant follow-up questions.

How would you phrase it? To the best of your knowledge when did you or a family member last use each?

MR. KLAUS: Yes. Correct.

THE COURT: Okay.

Anything else?

MR. KLAUS: We've only briefly perused that. I'm sorry, your Honor; question No. 32. I think you said that the case is expected to last four to five weeks. We think it probably is fair to say three to four, if that makes any bit of a difference.

THE COURT: That would make a big difference to the jury. Okay.

Now, I don't recall whether we've talked about sitting Friday. I think that we should sit Fridays, but if counsel have different views I'm ready to hear you.

MR. POMERANTZ: Your Honor, we assumed we were sitting on Friday.

THE COURT: Okay.

MR. POMERANTZ: The only date, if your Honor recalls, that we had asked for, was May 23rd because of my son's graduation.

THE COURT: I remember that and I have that noted. So, we will sit Fridays, three to four weeks.

MR. POMERANTZ: Your Honor, one other thing on the questionnaire. We have not had an opportunity to review this with our clients and so we would like to have the opportunity tomorrow to come back if there is anything more.

THE COURT: Of course. I view this as preliminary and, in fact, even as we are picking you can change your mind on certain questions.

MR. POMERANTZ: Thank you.

MR. BAIO: Your Honor, we have no preliminary reaction but we will absorb and refer.

THE COURT: Please note that I need your list of anyone you want me to identify, that is of course all the lawyers and witnesses or folks whose names may come up. So, if you will just note that for questions 30 and 31 I will need your lists.

On the subject of our being able to move appropriately through trial, I think it is important for me to stress that any rule 403 ruling I make now is tentative. It is subject to change when I see how the evidence might come in, in context.

Material can be deemed less probative when there is already a fair amount in the record proving the same point. It can tend to be more prejudicial depending on the context. So, I'm giving you general guidance to the extent I can to try to be helpful as you frame your opening remarks and decide witness order and so on but these are tentative rulings.

Do you have preliminary reactions to my opening remarks to the jury as opposed to the voir dire?

MR. KLAUS: Yes, your Honor. Thank you.

We were generally fine with it, subject of course we have not had a chance to discuss it with our clients, but our general tentative reaction was we were okay with it.

THE COURT: Okay.

MR. BAIO: Amazingly, we have the same reaction.

THE COURT: This is promising. I'm glad to hear that.

Mark Gorton's net worth.

I take the point on the IRA. I will be interested to hear defendant's response to anything in the recent letter including the IRA material. I had thought it was uncontested. It is something I have never encountered in a lawsuit before so I will have to learn about the law as you tell it to me.

I am not convinced by plaintiff's most recent submission that Mr. Gorton's net worth and related information about his finances will be more probative than it is highly prejudicial at an early stage in the case, but I'm going to

wait to hear as the case progresses when plaintiffs want to bring that up. And I will decide at each stage whether it is appropriate at an early time.

Do you wish to address this?

MR. POMERANTZ: Yes, your Honor, because we would like to mention it in the opening.

THE COURT: I'm sure you would.

MR. POMERANTZ: So, if I could have a moment to explain?

When Mr. Gorton made the decision in June of 2005 to move over $100 million of assets into these limited partnerships, in order to protect them from a judgment which he has said under oath that was one of his reasons for doing so, the fact that he moved them and he moved them in that amount is one of the strongest pieces of evidence that he knew what he was doing was going to cause a large liability, that is, a lot of damage that he would be responsible for. It is really perhaps one of the most compelling pieces of evidence of what was in his mind and state of mind is the very first factor that the Bryant Court lists. And so, it is to us one of the most important pieces of evidence because it will tell this jury that this guy not only knew what he was doing was wrong but that he knew it was going to cause an enormous amount of damage because when one moves $100 million plus into accounts to protect them from legal damages, if he didn't think that he was

causing at least $100 million worth of liability. And for the jury not to be able to hear that among the most persuasive facts of Mr. Gorton's state of mind seems to us to be extremely prejudicial to the Bryant factor of state of mind. Nothing, in our view, could be more telling to a jury about moving your own money in that amount over to these kinds of accounts.

THE COURT: Did your April 25 letter on this point cite all relevant law on this point or was it an advocacy piece that cited only the cases helpful to plaintiffs?

MR. POMERANTZ: It was definitely an advocacy piece. The question is whether there was other case law that addresses the issue and I don't know.

MR. KLAUS: I don't know whether there is other case law that addresses this issue, your Honor.

THE COURT: Okay.

MR. POMERANTZ: We can call -- Mr. Blavin of our office is the one who did the underlying research for this and if your Honor would indulge us until tomorrow to see whether he found additional case law we would be happy to find that out.

THE COURT: Thank you.

Mr. Baio?

MR. BAIO: Your Honor, just as a check, may we also look and submit a letter to you?

THE COURT: Of course.

MR. BAIO: Thank you. We will do that.

MR. POMERANTZ: The other point, your Honor, is that simply the deterrence factor which is, again, clearly a factor under Bryant, there is case law on point and I know your Honor has seen that already but we do think that that also -- but here, although I think the case law is strongest on the deterrence element, when you think about the fact pattern here and you think about what we are trying to explain to the jury, what was in Mr. Gorton's mind, what was his state of mind, I really do believe that his decision after Grokster to move his assets over is going to be among the most persuasive pieces of evidence to the jury that he knew what he was doing was causing a huge amount of damage and that he could be liable for it.

THE COURT: Is part of your argument that what Mr. Gorton did with his money in June of 2005 is probative of what his state of mind was prior to 2005? Or are you simply looking prospectively.

MR. POMERANTZ: Both, your Honor. I think in other words we will put on evidence that he was actively following the Grokster case from the time it was filed in 2001 to the time the Supreme Court decided it in 2005, and he knew that the ruling in that case was going to affect, greatly, the legal exposure of Lime Wire.

So, we will then tell the story that as soon as Grokster was decided he moved his assets into these partnerships for the express purpose of protecting them from a

legal judgment that the record companies may someday get.

THE COURT: Why don't we do this. Why don't we table this until tomorrow, at which point Mr. Baio's team may have come up with a response.

MR. POMERANTZ: Thank you, your Honor.

THE COURT: I don't know how quickly you can do that if so many people are here in court, but.

MR. BAIO: Your Honor, may I address one part of that?

THE COURT: Yes.

MR. BAIO: The opposing side says that the Grokster case is critical because prior to the Supreme Court case the rulings were in his favor, but only when the Grokster case came down does he now have the exposure and then moves the money. But, at the same time they want to open the door on Grokster but not allow him to say that that means that up until the Grokster decision his mindset was the opposite. I don't know how they can have it both ways. They are opening up the door as to the significance of the Grokster case and the fact of the matter is that until June of 2005 the world, including our opponents, thought that the law went the other way. We have Mr. Horowitz saying the law went the other way.

This is new law and gives us a new and fresh opportunity. At the same time they want the benefit of that and they said they want his state of mind to be identified before that but his state of mind of course before Grokster was

hip hip hooray, the law is on my side.

So, I'm not really sure how they can have it both ways -- or three ways it might even be.

MR. POMERANTZ: Your Honor, if I may briefly respond?

THE COURT: Yes.

MR. POMERANTZ: Mr. Baio is confusing two things.

The state of mind before Grokster and leading up to Grokster of Mr. Gorton, the reason why they can't bring in evidence on that is because they asserted the privilege. Not on relevance ground, because they asserted the privilege. So, that's certainly a totally different analysis.

Here what we are saying is that the conduct of moving that amount of money or assets into the limited partnerships at the time he did that is extremely compelling evidence of his state of mind. Just because they asserted the privilege doesn't mean that we can't try to prove his state of mind in a way that would be compelling to the jury as one of the factors it is going to consider in thus setting the statutory awards.

THE COURT: I want you to know that I haven't missed the point that this would be very, very favorable for plaintiffs and of course you will be fighting to get it in. I understand that.

MR. POMERANTZ: Thank you.

THE COURT: With respect to Mr. Von Lohmann, I was handed material that my law clerk was handed material this

morning. I have not been able to look at it. Do you want to give me a thumbnail sketch of what it says? Or do you want to wait until I read it?

MR. MUNDIYA: Sure, your Honor. I will give you a summary.

Mr. Von Lohmann was deposed yesterday. He had put in a declaration last week, as did an internal lawyer at EFF to answer your Honor's questions that were raised at the April 14th hearing. At the deposition we believe many of the questions that your Honor asked last week were answered. Mr. Von Lohmann was giving legal advice to Lime Wire, he viewed Lime Wire as his client. He had other clients like Lime Wire. He had two types of clients, he had litigation clients in which he prepared pleadings, appeared in court; and then he had confidential advisory clients like Lime Wire.

THE COURT: How many clients did he have at any one time?

MR. MUNDIYA: Several dozen, less than 50.

THE COURT: And did he do conflict checks for each of them?

MR. MUNDIYA: What Mr. Von Lohmann testified to is he couldn't recall doing conflict searches for all clients. He did conflict searches for some clients and not for other clients, but where it was obvious that there was no conflict he would not do a conflicts check.

In this case I think we can assume that he did have a conflict with the plaintiffs given the nature of his work. But, certainly there were conflict searches done, in some cases and not in other cases, but he could not recall -- he could not recall a conflict search for Lime Wire.

THE COURT: Yes, Mr. Klaus?

MR. KLAUS: Very briefly, your Honor.

We have our own letter and a copy of the transcript that should be coming today, we will send -- have sent it or are sending it by e-mail to the defendant's counsel.

Very briefly, what he was asked was: Generally, you would run a conflict check before entering into a attorney-client relationship with a counseling client?

He said: Yes. Generally I would try to do that.

You did not run a conflict check prior to entering a attorney-client relationship at Lime Wire, is that correct?

He said he did not recall.

There was further testimony that the EFF, which is the asserted law firm in this case, maintains a conflict check database?

THE COURT: I missed -- there was further testimony that EFF maintains a database.

MR. POMERANTZ: They maintain a database of their clients. He did not say whether they have, even today, Lime Wire entered as a client in that database. They submitted

a declaration from Ms. McSherry who is is at the Electronic Frontier Foundation, it was Exhibit B to our submission of last week. She does not say that they have any written record, conflict check record or anything of the type.

THE COURT: Let me ask, do they or do they not have written records of their conflict checks?

MR. MUNDIYA: Your Honor, I'm not aware of that specific answer to that question. We can find that out this afternoon, your Honor, from counsel to EFF.

THE COURT: Now, as I understand it Mr. Von Lohmann is available at 3:00 tomorrow. Is that what --

MR. MUNDIYA: Mr. Von Lohmann's counsel will be in New York tomorrow and is available after 3:00 p.m.

THE COURT: His counsel but not him?

MR. MUNDIYA: No.

THE COURT: Where is he?

MR. MUNDIYA: He is in San Francisco. He just flew back from Europe, your Honor.

THE COURT: Well, I don't -- I'm not comfortable with the record that we have so far. I'm very uncomfortable with the fact that defense counsel cannot say right now whether there was a written record of conflict checking. That strikes me as so basic as to suggest that someone isn't asking Mr. Von Lohmann the right questions.

MR. MUNDIYA: Let me go back and read the transcript

and confirm what we know. There were several privilege assertions by Mr. Von Lohmann's counsel based upon communications or -- based upon communications that they had with respect to other clients so there was a lot of privilege calls that we had no control over but we will endeavor to get answers to those questions this afternoon.

THE COURT: Okay. Can Mr. Von Lohmann be here tomorrow?

MR. MUNDIYA: We will ask, your Honor.

THE COURT: Okay.

Who is his lawyer?

MR. MUNDIYA: Winston & Strawn.

THE COURT: What individual?

MR. MUNDIYA: Andrew Bridges.

THE COURT: And how long has he been his lawyer?

MR. MUNDIYA: I'm not sure, your Honor.

THE COURT: Anything further that you wanted to say, Mr. Klaus?

MR. KLAUS: No, your Honor.

THE COURT: With respect to plaintiff's motion to preclude evidence or argument that other illegal services would have induced infringement of plaintiff's copyright had Lime Wire not done so, infringement, I have not found the cases mentioned by counsel to be particularly illuminating. Let me ask for, essentially, oral argument first from plaintiffs and

then from defendants. I am interested in knowing whether there are copyright cases where other illegal services have been an issue.

MR. POMERANTZ: Your Honor, I think there are only -- I only can recall two District Court cases where that issue was mentioned but not analyzed, I guess would be the right way to do it, in the copyright context.

THE COURT: Right.

MR. POMERANTZ: One going one way in some respects and the other going the other way in some respects. Your Honor, I can't say either one of those, there is a record company called RSO and the Marobie District Court case in Illinois sort of going the other way.

The ones that I found most persuasive were the patent cases and this is one area where I think there is no reason not to follow patent law. The Grokster case says that patent law is often something that the copyright case law looks to and that's in fact a part of the rationale for the inducement theory.

THE COURT: Let me, if I may, I don't usually do this during oral argument but I spent a fair amount of time yesterday trying to understand whether the law would be different in patent law cases from copyright cases. Could defense counsel give me the benefit of what you know on that?

MR. BAIO: Your Honor, we, as you only found or that

really the patent cases and those few patent cases that addressed it, we do think that the allegations -- and may I step over here?

THE COURT: Certainly.

MR. BAIO: The allegations in those patent cases stand in stark contrast, if I can explain why, from our case.

In this case the plaintiffs have a chart, you have seen it, they put it on the third page of their trial brief, and it says that in 1999 Napster showed up and everything started going downhill from there and we, the record industry, have suffered $55 billion of lost sales as a result of piracy. And they want to present that to the jury.

At the same time they want to say but the defendants caused some part of it but the defendants may not tell the jury that huge swaths of that $55 billion was caused by something else.

In the patent cases there were sales of knockoffs or sales of infringing items and those sales were for a certain amount of money --

THE COURT: Wait. Let me ask you this. To the extent that Lime Wire had a particular market share, let's say, certainly that can be --

MR. BAIO: Absolutely.

THE COURT: It is really the but-for where push comes to shove on this issue.

MR. BAIO: I believe it is both, your Honor, because I agree with you if they want to say $55 billion they can, but we can say look at how many times they say that Napster itself caused this tremendous economic impact on them. They're the ones who have put it in issue as a proximate cause matter.

They say here is a whole causal impact and you can't say in the real world there has been impact by other forms. Those patent cases say there is a question of lost profits, it is lost profits on those sales; they don't point to their sales revenue. I will give an example: In one of the cases the infringing item was some kind of concrete mixer, I think. And the claim was, well, you sold a bunch of these and we're entitled to our license or the amount of money that we would have received; and the other side said, no, there are two other infringing entities so we should be reduced by two thirds.

That was not allowed in this case but they didn't say in that case we suffered $100 million as a result of infringement and we want to blame defendant for everything that we suffered. And that defendant cannot say, wait, there were other actual causes. I'm not talking about those particular sales, I'm talking about whether there was a cause that you, yourself, record industries, have recognized wreaked havoc with you, list after list, public statement after public statement.

So, they have set as a foundation a lost revenue argument in the aggregate. If you even read their papers they

say it is piracy that has done this as if we are the only pirate. It is peer to peer, as if during the entire period including before the time Lime Wire existed which was really 2001, they're trying to put on us 1999.

So, they would show a chart, it would say Napster started, here is the downplay, but we can't say that Napster caused them any damage. They have put it in issue in a way that those patent cases absolutely have not. They use the trespassing example. If you are a trespasser you can't use, as a defense, the fact that someone else might have trespassed. But, if I was trespassing a vineyard and I ran over the fence and I had no right being there and I trampled some grapes, they can say you trampled grapes, here is the evidence. However, if a whole bunch of people also trespassed and they ran over the fence and they ran all through the vineyard and trampled all of the grapes, if the plaintiffs want to say look at the havoc that has been wreaked on my vineyard, in that situation we can say, yes, but I was one person, there was a whole band of marauders that ran through. They would say no, no, no, that's illegal. You can't point to the illegal folks.

And that makes absolutely no sense. It is not the patent cases, it is not the -- that's why I am not surprised that you don't see it in a copyright setting one single time. It hasn't -- so far as we can tell either it hasn't come up but you would think that it would be such a likely issue that it

would have come up.

So, I think that those patent cases are completely and totally distinguishable. That is not what we are talking about here. There are also other distinctions in that --

THE COURT: I think I need some help to understand your basic point.

I made an assumption fairly early on that may have been incorrect. Let me ask plaintiff's counsel: Are you truly contending that the entire downward slope since Napster is attributable to Lime Wire?

MR. POMERANTZ: We will -- the answer is that various witnesses will say various things -- witnesses on our side -- as to what their views are as to the causes of the decline downwards so I hesitate to put all of my witnesses into one box because people have different business experiences. But, if you are asking as between Lime Wire and other peer-to-peer services --

THE COURT: That's not what I'm asking.

MR. POMERANTZ: Just generally Lime Wire. No, I think there will be a number of witnesses who will point to other causes. By the way, we are not objecting to them pointing to a whole host of other legitimate causes for that decline and we will have a fair battle in the courtroom about that. And they have a bunch of factors they've listed that could be alternative explanations or additional explanations for the

decline downwards from 2000 to 2010. This motion does not, in any way, seek to preclude them from offering evidence of any legitimate cause.

THE COURT: I understand.

MR. POMERANTZ: So, I mean, if that answers your Honor's question?

THE COURT: Well, I had thought that this issue matters most if Lime Wire contends that when Lime Wire was taken down subscribers migrated to other unlawful services and, hence, plaintiff's argument that they would have gotten some of that migration is simply wrong.

(Continued on next page)

MR. BAIO: Your Honor, may I address that? I think that is entirely separate from what I am talking about.

THE COURT: I think it is separate.

MR. BAIO: Entirely separate.

THE COURT: I want to understand your point better.

MR. BAIO: OK. My point would be, let's use the analogy that was just had. We can use legitimate reasons, but we cannot use illegitimate means that cause them tremendous harm that they themselves have said.

So in the vineyard examples, although marauders ran through the vineyard, he would allow me to say that the weather was bad that day and that there was a downpour and that that contributed to the trampling of the vineyard, but I can't say what is an actual cause. There is not hypothetical. On the first page of the first brief, they say $55 billion of injury based upon the fact as to what we think we would have made, had there been no pirates, and what we made. They are laying at our feet everything. Now then they'll say, well, maybe not a hundred percent.

THE COURT: I --

MR. BAIO: That's in their brief, your Honor.

THE COURT: Yes. I am not able right now to understand part of what you're saying. It sounds to me as if a number of different factors are being collapsed into one argument and that when we tease them apart, they don't hold

water.

MR. BAIO: May I try to explain the other side of it?

THE COURT: Yes. But first, looking at the Fifth Circuit opinion, the *Compactors*, I recognize that it's very old and that it may be the closest case in point. I'm not sure whether it is. It essentially articulates, if we can give it such a fine appellation, a public policy argument that a bad actor should not be able to avoid being held accountable for his bad acts simply because there were other bad actors who would have stepped into his shoes. Now, as a general public policy argument, do you have a problem with that? Or I mean --

MR. BAIO: No, not directly, except when we get to the statutory damage elements which bring into the consideration to deterrence. But that's a separate issue. The key to what you said, your Honor, was, you used the word "would," "would" go to someone else. And what we are saying is, the plaintiff is identifying a historical impact of massive burden.

THE COURT: Of massive? Massive what?

MR. BAIO: Massive burden or harm, that they have suffered in this entire environment. And they want the jury to actually only hear about Lime Wire in the context of $55 billion. Now, we can talk about CDs are now, you can only buy a single because of iTunes as opposed to the whole thing. But we can't talk about the facts that they themselves historically, not the word "would," but historically, other

causes, including other forms of piracy, caused them massive injury. That should not be put as a causal matter at our feet. It's not a "would." The "would" part, that is, w-o-u-l-d, is, under the six factors, one of them is the deterrence on -- one of the things that the jury should consider is the deterrence on the defendant and on others. Normally that would not be in a civil case, the deterrence outside the world. But the plaintiffs get the benefit of having that as an issue. So they may say, as a matter of deterrence, you should give me a trillion dollars, shut them down, they are already shut down, but that will warn everyone else. Now, we're not saying they can't say it, in an ordinary civil case they wouldn't be able to but with statutory they can, but we're a defendant. We get to defend. So we should be able to tell them that they themselves don't believe there's a deterrent effect because they have 45 charts -- that's an exaggeration -- they have charts that show that migration has historically occurred automatically when they shut down -- Napster and Grokster -- and that it's continuing with the shutdown of Lime Wire. It's just so the jury can evaluate fairly whether deterrence will be served by a monumentally gigantic amount. We're not saying they can't argue. They are saying we can't argue. But that only gives the jury half the pie. And that part of it is the "would." But the "did," they *did* suffer injury from others and they *are* trying to lay that at our feet, has nothing to do with

the public policy matter. It has to do with causation. And that's why I used the vineyard as the example. And there may be a lot of others. I own a lot of cars. Somebody took one car, but the entire lot has been cleaned out because some group of chop-shop people came and pulled it out. You're blaming me for the one car. OK. But you can't present evidence to the jury that my lot has been completely eliminated, because then other people would say, but my car was stolen, actually stolen. It's not what those cases stand for at all. They can't. It's actually what happened. It's not a hypothetical. And I think they are two different things.

THE COURT: Let me go to an analogy that has been bothering me. In antitrust law, Congress has allowed treble damages for the deterrent effect that they have. I have never heard of a court allowing the argument that just because the awards of treble damages in the past have not completely deterred price-fixing, that they shouldn't be awarded.

MR. BAIO: I am not an antitrust lawyer, your Honor. I don't know whether there is a distinction for that. I assume the defendant can mount some defense against treble damages, that it or he are allowed to present something to the jury to say, deterrence should not be applied here, or treble damages shouldn't be awarded. What the plaintiffs are saying is, we have to sit mum, there is no question about -- if they say a trillion dollar verdict will in fact stop the world from being

bad, I have to sit there mum. And I don't know whether that's true in antitrust cases.

THE COURT: Now, what do you envision as the endpoint of allowable speculation as to what is likely to happen? What if there were board of directors meetings of all recording companies saying, we haven't put much money into this yet, but having heard oral argument today in the Southern District, we are suing every purveyor, every unlawful purveyor or enabler of file sharing, music sharing.

MR. BAIO: That might be --

THE COURT: Could that be introduced? Where do you end on the speculation of who might do what?

MR. BAIO: I think if it were the truth, it may in fact have some impact. What we are talking about is what can be argued, not what the resolution is. And what we're asking for is an opportunity to be able to argue based on reality or based on what they themselves have actually said, again and again frequently. And that distinction between what actually occurred in the past, as a response to large damages, is distinct from what might happen in the future and what has happened in connection with migrating on the deterrence issue. Those are entirely different, your Honor. And I think if they are going with this massive loss and harm historical argument, we should be able to identify what really happened.

The migration is what would happen. So don't give --

so those are distinct. And I think -- I'm trying not to jumble them together. I'm trying to make them separate, because I think the evidence gets in for the response to, we were harmed to the tune of billions, billions, billions, billions.

THE COURT: Well, I want to keep at this until I understand your point because I know it's important to you.

MR. BAIO: Also, there's only 10,000 or 11,000 works. Yet we will hear about billions and billions of injury, which of course cannot be part of the compensation, at least the element of lost revenues. It's lost revenues on the 11,000 works, so the confusion element of it is very significant. And it becomes substantially enhanced if the jury is kept blind to the effects of all of these other occurrences in reality that affected the dollar amount. So not only will we be talking about a number that really can't apply to the 11,000 works --

THE COURT: It seems -- maybe you can defuse my confusion. It seems to me that a jury would certainly hear what share of the market for any sales or sharing of music Lime Wire had.

MR. BAIO: Absolutely.

THE COURT: The jury would not need to know whether the other options were legal or illegal. Would that be your view?

MR. BAIO: I wouldn't have to say they're illegal. They're a fact, that people used Kazaa, according to the

plaintiffs, for billions of downloads, that were not with payment to us. So they can't put that on our dime. And it also is not the 11,000 works.

THE COURT: Are you arguing that, Mr. Pomerantz?

MR. POMERANTZ: No, your Honor.

MR. BAIO: Then the evidence gets admitted and I would sit down at this point, your Honor.

THE COURT: Which? The evidence of --

MR. BAIO: The fact that there were all of these other causes that led to their loss, not Lime Wire. That's the evidence I want to put in. I don't care whether I use the label of, you know, illegal. Somebody used Kazaa, other people used YouTube, other people used Napster. And they themselves said, billions of dollars we lost, because of those things. That's not us. That's the point.

MR. POMERANTZ: Your Honor, can I clarify what we intend to do at trial? That may help this discussion.

THE COURT: Yes.

MR. POMERANTZ: May I take the podium?

MR. BAIO: Yes, sir.

MR. POMERANTZ: We will put on evidence that there was a lot of illegal file sharing, P2P usage going on. We will put on evidence that after the Grokster decision, a number of those illegal sites stopped infringement, but Lime Wire did not. And after that, Lime Wire's percentage of the illegal file sharing

business skyrocketed, up to 80 percent, let's say. I don't know the precise number, but let's say it's 80 percent. What we are trying to preclude them from arguing, and putting on evidence, because they have their experts saying this, is that if Lime Wire wasn't available, those 80 percent would have gone to one of the other illegal services. That's what we're trying to preclude.

THE COURT: That's the point I was trying to make when I was talking with Mr. Baio now. It's the but-for situation that you're really concerned with.

MR. POMERANTZ: Correct. And so we're not saying that somebody can't put on evidence, them or us -- I think it will be us first -- that there was this little increment that wasn't Lime Wire, because we need it for deterrence. We want to tell, we want to tell the jury that, you know, there are others out there who are not only thinking of doing but doing what Mark Gorton did and what Lime Wire did. So we are going to tell the jury -- we're not saying you can't tell the jury, they can't do it with a but-for issue that your Honor identified. What we're trying to preclude is the evidence through their experts Gorton, Mark Gorton, and argument through counsel that if Lime Wire didn't exist, that 80 percent of the infringements would have moved over here to another illegal service. That is the evidence and the argument that we're trying to avoid, which I think is exactly what the *Brothers, Inc.* case, the Fifth

Circuit case, and *Panduit* addressed.

THE COURT: May I -- what you say is enlightening to me about how you intend to use information on illegal businesses. You say plaintiffs need it in order to make your deterrence argument. If you need it for that, what you are deterring is not past conduct, it's future conduct. So what you are deterring is migration to illegal services. So that's on the table.

MR. POMERANTZ: Well, your Honor, I guess I would say, the point of migration assumes that you're looking at the prior users and what they in fact have done. And that's not what we are -- that is what we think should be excluded from evidence. We are not talking about what actually has happened in the past when you talk about -- I guess I -- that's not the -- I'm sorry.

THE COURT: Could I ask you, are you right now addressing just any testimony as to what migration occurred when Lime Wire was shut down? Or are you addressing --

MR. POMERANTZ: No, your Honor, I'm sorry. I am not addressing that issue. What I am suggesting is that we will put on testimony of what has happened in the past. And we will put on testimony --

THE COURT: In what time frame? Up to today?

MR. POMERANTZ: Up till when Lime Wire shut down, let's put it that way. I'm not yet addressing what happened

after Lime Wire shut down.

And we will show that a lot of infringements occurred through Lime Wire. We will show that that skyrocketed after Grokster, when other popular services shut down and everybody went over to Lime Wire. And we don't think they could say, well, if Lime Wire wasn't there, service X would have been the one to get all of those users, because in fact those users went to Lime Wire and downloaded music through Lime Wire. And we think -- I'm sorry.

THE COURT: I'm sorry to interrupt you, but you would be, in Mr. Baio's view, free to argue that. You would be free to argue whether the damages your client seeks would have a deterrent effect on migration to other illegal sites.

MR. POMERANTZ: Yes. But I guess what I want to try to avoid -- we would certainly not cross the line in the way we argue deterrence -- is the line that's drawn in the *Brothers, Inc.*, case, the Fifth Circuit case. What the court there did is, it looked at -- there were two other companies out there offering infringing products. And I don't see that it's a rationale that had anything to do with what somebody was saying publicly or privately about that. What the court was saying was, we're not going to allow you to argue that damages should be reduced because some of the people who bought from the defendant would have bought from these other infringers. And the reason why I think this is right on point is because first

of all the rationale applies equally to the Copyright Act, but the Copyright Act has one thing in addition that wasn't present in *Brothers, Inc.* And that is the idea of deterrence. This is an actual damages calculation. And I don't believe, your Honor, that deterrence was one of the factors in *Brothers, Inc.*, or in the *Panduit* case, which follows *Brothers, Inc.*

THE COURT: Let me just -- I'm pausing to read part of *Brothers, Inc.*

Well, I don't disagree that *Brothers, Inc.* stands for the proposition you stated. It's remarkable that it's so old, 1963, and there has been so little similar case law since then. It makes you, certainly makes you pause. Makes me pause.

MR. POMERANTZ: Well, the *Panduit* case in the Sixth Circuit is a case that was often cited as setting forth the considerations for calculating lost profits in a patent infringement case. And -- your Honor is looking for that case law.

THE COURT: I am. One second. I'm not sure I have it here. How do you spell it?

MR. POMERANTZ: P-a-n-d-u-i-t.

THE COURT: OK. And its holding is?

MR. POMERANTZ: What it says is, two different places, the first is on 1156 of the opinion. And it says, "To obtain as damages the profits on sales he would have made absent the infringement, a patent owner must prove" -- and then it lists

four factors. And the second factor is absence of acceptable noninfringing substitutes.

THE COURT: I know that in patent law that's been made pretty clear. And I'm wondering if there's some reason it's been made clear in patent law and not as clear in copyright law.

MR. POMERANTZ: I don't know the answer to that, your Honor, quite frankly. There's another page cite here which comes back to that point. It's on page 1160 of the *Panduit* decision, and there's a sentence that says, "Infringer Stalin, however, cannot expect to pay a lesser royalty as compensation for its infringement on the ground that it was not the only infringer."

So I think it's established in patent law. And I have not yet heard an argument -- I don't know that I can think of one -- why this particular doctrine from patent law shouldn't apply in copyright cases when you're looking at actual damages -- it's an actual damage calculation -- and then when you move to statutory there's certainly no reason because you're layering on top of it the congressional policy to use statutory awards as a deterrence. And it would be exactly contrary to deterrence to say that if there are others out there infringing, that that would be a reason to lower the statutory award, which is what they want to argue, that because others were available to induce infringement, that means Lime

Wire should pay less. That's what they want to argue.

THE COURT: Willkie Farr sent me a letter listing other copyright cases that had gone to jury. Did this particular issue come up in those cases? Take just one example. Did it come up in *Tennenbaum*?

MR. POMERANTZ: Well, again, because your Honor, with a direct infringement case, I'm not sure that it would have come up. The question is, the individual defendant downloaded the music. And the question is how much should that defendant -- it didn't really matter, in that particular case, whether they downloaded it from illegal service A or illegal service B. They illegally, unlawfully, downloaded some music.

So I don't think this issue that we're debating here today would come up, typically, in a direct infringement case of that kind.

THE COURT: Mr. Baio, do you want to respond on this point?

MR. BAIO: Yes, your Honor.

THE COURT: I should also allow everyone a break. It's about break time.

MR. BAIO: Should we break and then come back?

THE COURT: Whichever you prefer.

MR. BAIO: I'll proceed, your Honor.

THE COURT: OK.

MR. BAIO: I think when we see the transcript you will

see that Mr. Pomerantz moved back and forth from "would" to actual. And on the actual damages issue, how much harm they claim they suffered, historically, prior to the time Lime Wire shut down, they cannot say we suffered this massive injury from Lime Wire -- from all sources -- and you should make Lime Wire pay. They can say it, but not preclude us from saying it. But that there were other actual factors, not that people would have migrated, but other actual factors caused their actual injury. That's one thing.

THE COURT: That seems to me to be correct, Mr. Pomerantz.

MR. POMERANTZ: I'm sorry, your Honor. I'm not --

THE COURT: We're talking about what actually happened as opposed to what would happen in a but-for situation.

With respect to what actually happened, he's saying Lime Wire shouldn't be responsible for -- pick another company that --

MR. BAIO: Kazaa.

THE COURT: -- Kazaa, for the downloading that occurred through Kazaa.

MR. KLAUS: But the reason that there would be disagreement on that, to this point, your Honor, is because they're experts and said people would have used, forget about the billions of infringement through Lime Wire, it would have happened anyway, and their proposed jury instruction, no. 54,

on but-for causation, says, "If you determine the loss would have occurred anyway had there been no infringement of the sound recordings by these defendants, you may not consider such losses in your award of statutory damages." So if Mr. Baio is backing way from that --

THE COURT: I see.

MR. BAIO: Your Honor, I'm not, and I will address that issue. But so long as we all understand that on the front end, I will call it, on the actual damages issue, there will be significant evidence, including their own statements, about the massive impact that CD burning has had on them and how they've lost billions of dollars because of that. And if I can, that's that point.

The point on now but-for, we have a situation unlike the patent cases where the individual infringers paid nothing for the music. The plaintiffs want to argue that those individuals would have paid -- and I think they're going to use iTunes -- they seem to have been using iTunes as an example -- would have paid $1 for each one of these songs, and so that's what you should pay, that's what you should make them pay. And you can make the argument. Again, we're not trying to preclude any arguments. We, however, have expert testimony that people who didn't pay anything, many of whom don't even listen to what it is that they download, but they do it because it is free, would not have bought for a dollar. And they will not --

THE COURT: How are you going to show that they would not have bought for a dollar?

MR. BAIO: There are a number of ways. They have didn't look at it. They didn't buy -- they didn't pay --

THE COURT: I'm sorry. Who is going to testify to what?

MR. BAIO: Our experts will testify to as to -- and in addition they will to --

THE COURT: What will they testify to on this point?

MR. BAIO: They will testify to the fact that people who pay nothing, you cannot assume that they will pay a large amount of money for music, that they will fill their iPods by paying a dollar for each tune. They will say that there were other opportunities available to them so that they would not have paid money to the music company because those other opportunities, which included some legal opportunities that the music industry itself made available to them, the post iMesh site, 15 million songs, available for free, the YouTube, they would use YouTube or My Space or Facebook in order to hear music. And they wouldn't -- there's no evidence that those people would in fact have paid for the songs.

So they will be arguing from the reality that was available to them as to whether the jury should assume that they would have paid any money at all.

Now, they might go to concerts more because they're

listening to more music, and I understand they say, but that's not going to us, and then we say, but in fact now it is going to you, because you have 360 deals. So as a matter of evidence, we will submit what the reality was and what the reality is. They can argue that you shouldn't let them get away with it because, you know, they were bad, whatever else they want to say, but the idea that we can't talk about what reality was and what the consumer was facing at the time and that the hypothetical that they would have paid a dollar for some songs that they don't even listen to, and a whole host of other reasons. They might not even have the money. They themselves recognize that some people who get music for free don't have enough money to get it, so they wouldn't. We want to be able to present that to the jury, just to be able to be a fair and full evaluation of reality.

THE COURT: Mr. Klaus.

MR. KLAUS: Very briefly. I think that Mr. Baio is conflating two things. He's talking about the question of, on actual damages, would somebody have paid the money that you say they didn't, for the copy of the download that they have and that they're not giving back. We deal with that elsewhere in the instructions. The issue on the illegal services motion is, are they allowed to bring in an expert, are they allowed to argue to the jury that if they hadn't stolen it through Lime Wire they would have stolen it through somebody else. That's

what this issue is. That's what his jury instruction no. 54 says. If you determined they would have just stolen it anyway -- it's not a question of would they have paid money for it, would they not have paid money for it, would they have stolen it. That's what we seek to preclude from the illegal services motion.

THE COURT: OK. This might be a good time for a break. Let's take a 15-minute break.

(Recess)

THE COURT: Do counsel wish to argue more with respect to these at this point?

I have one question for Mr. Baio.

MR. BAIO: Yes, your Honor.

THE COURT: Going back to your vineyard analogy, suppose that a marauder comes through and tramples one quarter of the vineyard. Other people from the same village think, marauding is a great idea and they come and they see, well, a quarter has already been trampled, we're not going to trample that, the fun is in trampling the grapes. So they trample the other three quarters. Is your argument that the first marauder should not be liable because the subsequent marauders would have trampled all the grapes?

MR. BAIO: He should be able to argue that those marauders are not affiliated with me or related with me. The plaintiff can argue that I was the cause of all the marauding.

But they can't preclude me from saying there were other marauders. That's the point. It's an evidentiary point, not an argument point. Now, I may lose. The jury may say, no, you set the example of marauding for the world, or for your community. But that's an argument. And I can say, but that can't possibly be true for Napster, to transfer the analogy, because that occurred before us. It is impossible that it included CD burning because it's an entirely different approach.

So as a matter of evidence, if they can show the causal link between us and an injury that they suffered, that gets in and we get to respond. But not we get to say nothing, we get to pretend there were no other marauders.

THE COURT: OK. I understand that point. Thank you.

MR. BAIO: OK.

Anything further?

MR. POMERANTZ: Just to continue to use your example, just so our position is clear, we believe that either side can put in evidence of what actually happened, 25 percent by marauder one, the 75 percent by all of the other marauders. What they are precluded from putting on evidence of or arguing is that if the first marauder had not trampled that first quarter, the other marauders would have trampled that quarter. They are responsible for that quarter and they cannot put on evidence or argument that somebody else would have done the

same wrong. And so that, you know, to move to the facts of this case --

THE COURT: No, you put it better than I did. Mr. Baio, what is your answer to that specific point?

MR. BAIO: Our answer, your Honor, is -- of course the analogy limps a little bit -- and I know it's my analogy -- but in our case, what was taken was taken for free. And we think the jury can evaluate whether someone who got something for free would have paid anything, including whether other alternatives were available to them, both legal and not.

THE COURT: OK. I understand. With respect to Mr. Gorton's net worth and finances, my tentative view is that there will be enough evidence probative of his state of mind and conduct without the jury hearing his net worth and other information about his finances, except with respect to fraudulent conveyance and punitive damages. Defendants have already conceded that punitives are awardable.

I'd like to have your views tomorrow on, if I stick with that decision, which I expect to, how the issues will be segregated for the jury.

MR. POMERANTZ: Your Honor, may I ask one question on that?

THE COURT: Yes.

MR. POMERANTZ: Because we will think about it overnight and be prepared to respond. But when you say his net

worth, there are two things I think happening with respect to the events following the Grokster decision. One is moving assets into family limited partnerships, and the other is the amount of those assets that are moved in. While we respectfully disagree with where your Honor is right now, I would ask your Honor whether you would consider separating those two out so that in the initial phase of the trial, whatever gets incorporated into that, but the phase that includes statutory awards, we are allowed to talk about his decision to move assets into family limited partnerships even if at that moment in time we cannot offer evidence about the amount. It's a line, your Honor, that would allow us to still make some of the arguments we think are particularly relevant.

The other thing, just I became aware of from my clients during the break, your Honor, is when we are on the other side of copyright infringement cases, which happens from time to time --

THE COURT: "We" being the law firm or --

MR. POMERANTZ: No, no, no. No. "We" being the client, the record companies. Occasionally somebody accuses them of using their music to make this new song, something like that. And sometimes the plaintiff seeks statutory awards against our clients. And it's almost always the case that because of the deterrence element in statutory awards, the plaintiff is allowed to put on evidence of the net worth of the

record company. And we can provide your Honor with some examples of that.

THE COURT: One second.

OK. I'll be interested in hearing that.

MR. POMERANTZ: We will get examples of that overnight, your Honor, and be prepared to present those tomorrow as well.

THE COURT: OK. With respect to your suggestion that -- I think the argument is that if you separate the moving of assets from the amount of assets moved, you have greatly diminished the prejudicial effect of the evidence. I'm not persuaded at this point that the probative value of moving assets is sufficient to outweigh the unfair prejudice.

MR. POMERANTZ: All right. We'll work on it.

THE COURT: I think it can be motivated by many different things, and I think you'll have enough else in the word that you won't need this, but that's one reason Rule 403 judgments are saved for trial.

MR. POMERANTZ: Thank you, your Honor.

THE COURT: I'd like to move on to plaintiff's motion in limine to preclude evidence or argument inconsistent with facts established at summary judgment. I grant the motion in part and deny it in part.

I grant plaintiffs' request to preclude any evidence or argument inconsistent with the facts established as a matter

of law in the May 2010 decision. Where issues are decided as a matter of law on partial summary judgment, those issues are deemed established for purposes of trial. Unless and until the Court changes its initial rulings pursuant to Rule 54(b), the parties have a right to rely on the Court's rulings.

Defendants question whether, in light of the May 2010 decision's failure to cite to Rule 56(g), the decision could have "established" any facts. I reject that argument. Rule 56 permits but does not require the Court to narrow the issues to be tried when it cannot grant all the relief requested by a motion for summary judgment. Specifically, the Court may narrow the issues for trial by entering an order disposing of a material fact not in dispute. The existence of this discretionary procedure does not, however, render obsolete the traditional function of summary judgment.

Pursuant to the May 2010 decision, I granted partial summary judgment in favor of plaintiffs. The decision found that numerous facts have been established as a matter of law. The parties thus may not introduce evidence or argument that is inconsistent with those determinations.

Plaintiffs contend that defendants may not present evidence or argument that is inconsistent with the Court's finding that a "conclusive determination" of infringement may be made through analysis of a digital audio file's "hash." My order of yesterday amended the May 2010 summary judgment

decision and stated that genuine issues of material fact exist as to whether hash-based analysis can conclusively determine the existence or extent of digital file sharing.

(Continued on next page)

THE COURT: Accordingly, plaintiff's motion to preclude defendant's from offering evidence and argument on that matter is denied.

The plaintiffs seek to preclude defendants from offering evidence or argument that is inconsistent with any findings in the May 2010 decision relating to factors in the statutory damage calculus. Defendants state in their papers that they wish to submit evidence and argument on all Bryant factors but their arguments in the instant motion focus on two factors alone, the infringers' state of mind and the conduct and attitude of the parties. I therefore address only those two factors.

Yesterday's order affirmed that my May 2010 decision established, as a matter of law, that defendant's conduct was "willful" within the meaning of Section 504(c)(2) of the Copyright Act. Defendants are thus precluded from offering argument or evidence that is inconsistent with that determination.

Plaintiffs ask the Court to preclude defendants from offering he was and argument on whether plaintiffs prevented defendants from conducting effective filtering and on whether other "distributors experienced occasional difficulties in filtering copyright content." I grant plaintiff's request.

In the May 2010 summary judgment decision I found, as a matter of law, that Lime Wire failed to implement, in a

meaningful way, any of the technological barriers or design choices that were available to diminish infringement. On summary judgment defendants contended that the alleged failure of certain record companies to provide Lime Wire with lists of copyrighted recordings and their hash contents precluded Lime Wire from enabling effective filtering mechanisms to curb infringement.

The argument in this regard did not create a genuine issue of fact as to whether defendants took meaningful steps to mitigate infringement. Indeed, I found that defendants engaged in an intentional course of action to preserve infringing activities among Lime Wire users. In short, I already determined, as a matter of law, that defendants failed to mitigate infringing activities. This conclusion may not be relitigated in the damage phase. Accordingly, defendants are precluded from introducing evidence or argument on, one, plaintiffs' purported failure to provide defendants with lists of copyrighted recordings and hash contents; and two, other distributors' filtering difficulties.

Moving to defendant's motion *in limine* to preclude certain references to the Court's statements, opinions or conclusions in the May 25, 2010 opinion and order granting summary judgment, I granted in part and denied in part.

As a preliminary matter, defendants note that the May 2010 decision did not cite to Rule 56G of the Federal Rules of

Civil Procedure and defendants thus question whether the jury may properly be informed that the decision "established" any facts. That is not an impediment, as I mentioned earlier.

Turning to defendant's Rule 403-based objections, defendants have moved, pursuant to Rule 403, to preclude if I reference to the Court's "statements, opinions or conclusions" in the May 2010 decision beyond what is included in the defendant's proposed jury instructions. Defendants also seek to preclude, pursuant to Rule 403, any reference to this Court's role in rendering previous decisions in the instant matter.

I reserve decision on Rule 403 determinations until trial when the matters can be judged in context. However, I think it may be useful to give some general guidance. First, unless the Court specifically grants application to make a particular reference during trial but outside the presence of the jury, the parties will not be permitted to inform the jury of any rulings that the Court has not already articulated.

Second, I am likely to permit counsel to inform the jury of rulings that established relevant facts such as, for example, that a Court has determined that defendants are liable for inducing the infringement of plaintiffs' copyrights, that defendants acted willfully, and that Lime Wire users directly infringed plaintiffs' copyrights.

Any such references are likely to be permitted only to

the extent that the words used in front of the jury are necessary to convey to the jury the legal determination at issue. For example, Rule 403 would permit this statement: "A Court has determined that Lime Wire users infringed plaintiffs' copyrights by sharing unauthorized copies of plaintiffs' sound recordings through Lime Wire." However, Rule 403 would not allow reference, as follows: "A Court has determined that Lime Wire users engaged in massive -- I underscore massive -- amounts of infringement, etc."

The core legal conclusion in that example can be stated without including terms that might result in juror confusion or unfair prejudice. The parties should not personalize my role in adjudicating previous decisions. The parties may state that the Court has previously determined that Lime Wire users infringed plaintiffs' comprise but the parties may not state that Judge Wood has previously determined that Lime Wire users infringed plaintiffs' copyrights.

I order counsel to meet and confer before trial and to attempt to stipulate to references to the Court's prior decisions that are consistent with these guidelines. I note that no portion of the Court's earlier decisions may be read to the jury.

Do counsel have any questions on this now?

MR. POMERANTZ: Your Honor, I know we are going to get to jury instructions either this afternoon or tomorrow, and if

we have a jury instruction which I believe is proposed instruction no. 2 from the plaintiffs' which lists a bunch of what we thought were material, undisputed facts from your order, and I assume we are going to go over those in particular, maybe that's what you want to us to try to stipulate to first given your Honor's ruling?

THE COURT: Well, these -- let me ask you what you're asking me.

MR. POMERANTZ: That's a good question. I'm thinking about what I'm going to be allowed to say either in my opening or in questioning a witness and as I understand, your Honor, if your Honor has instructed the jury of something, we can go that far and try to closely track what your Honor has already said to the jury without using your Honor's name in that but just simply saying the Court and I understand that.

So, that leaves us then to try to anticipate what your Honor is going to actually say to the jury. I know part of it --

THE COURT: Oh, I'm not going to keep you guessing. I will tell you ahead of time every time and allow argument.

MR. POMERANTZ: Thank you.

THE COURT: Mr. Baio.

MR. BAIO: Your Honor, I'm sure I will have clarification questions based on what you have said. I just haven't formulated them yet.

THE COURT: That's okay. We have tomorrow.

I have questions about particular points of evidence and I'm wondering whether plaintiffs can have a final song list by tomorrow.

MS. LeMOINE: Yes, your Honor. Melinda LeMoine for plaintiffs, your Honor.

The answer to that question is, I hope, yes.

THE COURT: We shouldn't have asked for clarification of your first answer.

Okay. It is okay.

MR. BAIO: Your Honor?

THE COURT: Yes.

MR. BAIO: There are, I think, although I'm not sure, there will be an issue about the 412 songs and the 1,322.

THE COURT: That's what I'm hoping you would work out.

MR. BAIO: We will try, but I think we may have a difference of opinion as to the law and your ruling and I'm not sure -- we don't have to raise it today but we may want to address that tomorrow.

THE COURT: Well, if you have disagreement on the law it would be helpful if you each send me a letter stating your version of the law and what authorities support it.

MR. BAIO: Yes. We will.

THE COURT: Okay.

I would like to ask plaintiffs' counsel at what point

in trial you expect to introduce evidence on fraudulent conveyance, unjust enrichment and vicarious liability.

MR. POMERANTZ: Our intent, your Honor, was to have only, given your Honor's prior ruling, what we were thinking was to simply have what I call two phases to the trial. The first phase would be everything other than the amount of punitive damages including asking the jury whether punitive damages should be awarded which would require us to tinker with the instructions that have thus far been; submitted, and then the second phase would simply be that if the jury answered that question yes, we would come back with any evidence that would be only relevant to setting the amount as well as any argument relating to punitives. But everything else, we believe, would all come in in the first phase.

THE COURT: Mr. Baio?

MR. BAIO: I wasn't --

THE COURT: Do you have a view on the propriety of what Mr. Baio said?

MR. BAIO: I wasn't sure whether that meant that the fraudulent conveyance comes in -- that comes in in the front end.

THE COURT: I think that's your view; is that right, Mr. Pomerantz?

MR. POMERANTZ: That's correct, your Honor.

MR. BAIO: We think, your Honor, that that increases

the chances significantly and, as a matter of 403, that the jury will absorb and interpret that evidence that goes in on the fraudulent conveyance on the statutory damages matters. You will have already instructed on willfulness and I think there is a certain cumulative piling on element that will lead to perhaps confusion in the jury's minds as to how much they're supposed to weigh that -- that is, the fraudulent conveyance evidence -- in determining not punitives and not whether there was a fraudulent conveyance but everything else that they'll be doing. So, you have a likelihood of mushing it up.

I could understand why the plaintiffs will want that but we think that that would be unfair to us. And if we are talking about a bifurcation, we would propose that the fraudulent conveyance be part of that second phase so that way there is no either likelihood or opportunity for there to be spillover on the Bryant factors based upon the conclusions on the fraudulent conveyance.

THE COURT: Upon what evidence would the jury rely in the first phase to determine whether punitive damages are appropriate?

MR. POMERANTZ: You are asking us, your Honor?

THE COURT: I will be asking Mr. Baio but I will ask you too.

MR. BAIO: I think, your Honor, part of your rulings, I hope, or one of the effects of your rulings, is that it will

streamline some of the evidence. I mean, the jury will hear, I assume, based upon what your ruling was yesterday, that the defendants were willful and that they, as you have described in this document that we saw this morning, that there was intentional inducement. And they will be putting in evidence as to the amount and they will be putting in evidence as to the time and they say they're going to be putting in evidence as to Grokster and there is no shortage of evidence that -- and findings that have already been adjudicated that they bundle up and they make the argument that there should be a hearing as to punitive damages. By separating out fraudulent conveyance you eliminate the possibility that taints the analysis of the statutory damages.

So, other than the fraudulent conveyance they can have at us largely based upon what your Honor has already found. I hope we don't end up with accumulation of you describing that they were willful and that there was intentional inducement and then we spend two days proving that they were willful and then intentionally inducing. That seems to me to increase the likelihood significantly that the jury will be confused as to what their role is. You have already said they are willful, you have already said there was intentional inducement. If they're going to be proving a great deal of what has already been proven, I think it has a cumulative and unfair effect on the jury. They've won on those motions.

So, I think they have plenty that they can deal with to argue in favor of punitive damages without enhancing the likelihood that the fraudulent conveyance will taint that process.

THE COURT: Thank you.

Mr. Pomerantz?

MR. POMERANTZ: Your Honor, I think our evidence that supports our claim for statutory awards and the evidence we put on for fraudulent conveyance both relate to whether punitive damages should be allowed. We will, I guess, be discussing tomorrow whether there is sufficient reason to have what we will call the fraudulent conveyance evidence is also relevant, probative and outweighs the prejudice for the statutory awards issue and we will come back to your Honor on that tomorrow. But, I do believe that the kind of bifurcation that defendants seem to be seeking would be prejudicial to us in getting the right evidence in front of the jury to make all of the decisions. And I think that to the extent we are unable to persuade your Honor tomorrow that the transfer of assets is also relevant to statutory awards, I do believe that your Honor could issue whatever instruction your Honor thinks is appropriate to the jury without precluding us from having to -- from asking questions in a timely and organized way of witnesses like Mr. Gorton. But, I do believe at the end of the day that we will hopefully be able to persuade your Honor that

all of this evidence is relevant to the issue of statutory awards and so you are not presented with the problem that your Honor I think may be grappling with and that only the amount of punitives be separated and decided in the second phase.

THE COURT: I have to confess ignorance about bifurcation of this type because I have never had a trial where damages were bifurcated from liability or where punitives were bifurcated from compensatory.

Is there law supporting a trifurcation, that is, that whether punitives are granted -- well, let's stick with bifurcation.

MR. POMERANTZ: Your Honor, I have not researched it recently but I am aware of situations where Courts will do what I thought your Honor might have been suggesting and in one of your orders last week, which is to put the question of whether punitives are available into a phase I and then if the jury says yes, to put on the evidence and argument in a second phase with respect to the amount of punitives. I believe that is a not uncommon approach.

THE COURT: How common is the other approach which would be to have the second phase deal with whether punitives are appropriate and, if so, in what amount?

MR. POMERANTZ: I'm not aware about trifurcation. I have not studied it but I'm not aware, if I understand your Honor --

THE COURT: I didn't mean trifurcation, I meant bifurcation -- I meant a trial on statutory damages. If I do not allow fraudulent conveyance in on statutory damages whether it can appropriately be saved for the punitive damage phase with respect to both whether punitive damages are appropriate and, if so, in what amount.

MR. POMERANTZ: I'm not aware of that kind of bifurcation occurring, your Honor, and I must say I have not researched it in depth but I am not aware of it as I stand here.

THE COURT: I will ask counsel to do whatever preparation you can on that for tomorrow.

I think at this point if we might take a lunch break and come back on Daubert issues? Thank you.

We are adjourned.

MR. POMERANTZ: Your Honor, what time would you like us back?

THE COURT: An hour from now, let's say at 1:30.

(Luncheon recess)

(Continued next page)

THE COURT: I am sorry to have asked you to eat so fast and then be late. We had production problems.

My law clerk is going to pass out copies of a draft *Daubert* opinion, which we can discuss after a break today. I'll give you time to read it. But I thought that before we get to that, we might want to deal with loose ends from this morning and other issues.

I am still considering and I will still be considering as of tomorrow the issue of the extent to which evidence with respect to other illegal services will be admitted. And so we will see that I've noted as tentative a portion of my *Daubert* draft that deals with that evidence.

Going back to how many works there are, what is the legal disagreement there?

MR. POMERANTZ: Your Honor, I can state the issue, but I would like someone else on my team to argue the issue. But I believe the issue is who has the burden of proof, and that issue is set forth in at least one and maybe more jury instructions that I have submitted to your Honor. So I think that's, in a 30,000-foot view, the issue that separates us.

THE COURT: If I were to read and decide motions with respect to jury charges a week before every trial, I would do nothing but read jury charges all my life. So I have not read most of your jury charge. And I don't expect to begin to do that until you've given me revised instructions that reflect

all the decisions that have been made since you first brought them in. I also won't expect to have a charge conference, a general one, until well into trial.

MR. POMERANTZ: Yes, your Honor. We understood from one of your questions to us this morning that we would write a letter to your Honor tonight that would explain this burden of proof issue. It would refer to some of the cases and arguments that we cite in that one jury instruction, but we would pull it out, and I think what your Honor asked us to do was to send a letter explaining what that issue is. And that's what we intended to do tonight. It would be available to your Honor for tomorrow morning.

THE COURT: That would be fine. I was just curious as to what issue could be left, and I guess burden of proof is one that could be left.

I would appreciate plaintiff's counsel totaling up how many works there are. We simply don't have the resources to have people count them.

MR. POMERANTZ: We will do so, your Honor.

THE COURT: There are remaining claims that we didn't touch on, unjust enrichment being one. I'm wondering how plaintiffs expect to bring that claim forward, unjust enrichment and vicarious liability, and whether these are claims that are alternative to something else, whether you're ready to strike them.

MR. POMERANTZ: No, your Honor. We don't believe they are alternative. The vicarious liability claim will be based upon the evidence that we would be offering already on statutory awards and fraudulent conveyance. And the unjust enrichment claim would be based on the same evidence that would support the fraudulent conveyance claim.

THE COURT: If we picture special interrogatories to the jury, that is, a special verdict form, what difference would it make to a plaintiff's award if the jury finds vicarious liability?

MR. POMERANTZ: I believe the way the parties have agreed on the instructions is the amount of damages would not be different. It would be an alternative theory of liability upon which we could get the same damages.

THE COURT: And the same for unjust enrichment?

MR. POMERANTZ: Hold on a second, your Honor. Let me just... (Counsel confer)

That would track fraudulent conveyance claim in the sense that it would seek the return of the money from the FLP to Mr. Gorton so that it would then would become available to us to satisfy the judgment.

THE COURT: OK. Thank you.

All right. We've gone through most of my agenda. This might be a good time for you to read the *Daubert* opinion and shall I assume 30 minutes is enough time?

MR. POMERANTZ: Yes, your Honor.

PLF ATTY 2au: Yes.

THE COURT: OK. Thank you. If you're not ready in 30 minutes, you can let my law clerk know that. Thank you.

(Recess)

THE COURT: Would counsel like to discuss any part of the *Daubert* opinion today, or would you rather wait until tomorrow, the draft opinion?

MR. POMERANTZ: Yes. There is an issue or two we would like to discuss with your Honor tomorrow, if that's OK with your Honor.

THE COURT: That's fine. Do you want to give me a preview?

MR. POMERANTZ: Sure. Yes. The illegal -- to the extent your Honor has deferred ruling on what to do about evidence relating to other illegal services, we think that affects not just Mr. Sinnreich's testimony but also a portion of Mr. Strong's. But we will simply await tomorrow on that.

THE COURT: I understand that.

MR. POMERANTZ: The other issue that we want to consider overnight and discuss with your Honor tomorrow is the issues relating to whether the users of LimeWire would have paid any money to buy the recording if illegal services -- if they were not available for free. And we think under the law that that may not be a relevant consideration here. And I'll

just articulate briefly our thinking and then we'll be hopefully a little more articulate tomorrow. When someone in LimeWire's position takes our recordings and distributes them to others, we believe the appropriate analysis is, what is the fair market value of what LimeWire took and gave to others, and they're keeping. They're not giving it back. And the question is not relevant whether those users would have, in a but-for world, bought it. They have it, and they're not giving it back. They have the copies of the recordings. And in some cases, such as the *Davis* case, the court looks at the fair market value to determine what LimeWire should pay for these infringements. And we think that's the right way to look at it.

And to put it in an example, when we sell the recordings to legitimate retailers, like iTunes or Amazon, they are free to turn around and sell it for any price they want. They could sell it for 99 cents, or they could give it away for free, as long as they turn around and pay us what the contract says, which is roughly 70 cents in most of the relevant time period for an individual track. And they could make the decision that they'll give it away for free for a while to build a huge user base and then do whatever they want with that user base to try to make money.

So we believe under the law -- and we'll give some thought overnight to this -- but we think under the law it

really doesn't matter whether the users would have bought the particular recording or not in the but-for world, because they are keeping that, and we therefore need to look at what the reasonable value, the fair market value is of what the agreement would have been between my clients and LimeWire. What LimeWire offered to its customers, to its users, is basically what iTunes was offering to its customers, a permanent copy of the recording. So we would like to present to you case law and argument as to the relevance of that issue. And that would bear upon, I believe, some of the portions of the testimony of both Mr. Strong and Mr. Sinnreich.

THE COURT: Mr. Baio.

MR. BAIO: Your Honor, tomorrow, we will be preparing to respond to those points, which I think are actually interrelated. The fact is, again, my initial reaction to that is, what the plaintiffs say is that you're allowed to ignore what the real-world environment is and only their argument gets to the jury, that the argument that in fact people who have no money wouldn't have bought a record shouldn't be allowed to be put before the jury and that it is not a question of their theories, which in fact change all the time, they are not just suing for the license value of a particular set of songs, because now they are selling those for as little as a half a penny, and if they want to go that way, we want to be able to respond to it. They doesn't license now, it's not licensed to

iTunes. ITunes sells it or not. And when there is a YouTube click, YouTube will pay them something like one half of one penny.

We think the jury has to know what's really going on in the world and not just the artificial world that the plaintiffs are trying to graft on what the jury is going to evaluate and what they're going to conclude.

THE COURT: In that real world, what evidence will you have as to who could afford what?

MR. BAIO: There is, I believe, in our expert reports, data that suggests and reports and studies that have been undertaken and statements in -- I'm thinking of the EMI reports right now -- that a download does not equal a sale. In fact, some people can't afford it. That's right out of their own mouths.

THE COURT: The real world being as specific as "some people." I thought that was your position.

MR. BAIO: Yes. We're not going to be putting on a particular person to say that I took music because I had no money and it was available to me. But their own statements and their own evaluations and their own reviews show that they recognize that. And really, at the bottom of all this is, we simply want to be able to present to the jury what really is happening out there. We understand that under statutory damages, that Mr. Gorton and LimeWire will suffer consequences.

And now we're talking about what are the extent of the consequences of the and it isn't in an artificial world that should one should evaluate that. They say they lost billions of dollars in revenues. We have should be able to show that that's not really true. It would not have been the fastest growing business in eternity if there hasn't hadn't been a LimeWire, which is in a way what they are suggesting. And we want to be able to counter that. That's all. It's just a question of the jury having before it a balanced presentation of the real world, not the LimeWire-only world. But we'll have more tomorrow.

THE COURT: Yes. For reasons I can't explain, that reminds me of a loose end, which is some of the testimony by -- how do you pronounce Sinnreich? Reputational missteps. That page 59 of his contains a lot of material that I think is inadmissible. I just want to be sure that no one thinks that my *Daubert* opinion is the final word on admissibility. We simply haven't been able to mill fine enough, I think, in our conferences to get to these points.

Multiple sclerosis patients being sued --

MR. BAIO: We understand that part of the ruling, your Honor.

THE COURT: OK. A question for plaintiff's counsel: How do you expect to present evidence about the damage award per work? Taking into account that there have been individual

judgments against some direct infringers with respect to a work? Are you going to somehow group these, or what are you going to do?

MR. POMERANTZ: Are you asking about the actual -- for the pre-'72 recordings, or are you asking about in statutory awards and whether there is going to be some deduction because of the individual -- that ruling?

THE COURT: Statutory awards, yes.

MR. POMERANTZ: Can that be on the agenda for tomorrow as well, your Honor?

THE COURT: Yes.

MR. POMERANTZ: I just want to think through the issue how -- I understand what that prior order -- I think I remember what that prior order said. I just want to get it back in my head and make sure we have an accurate response.

THE COURT: OK. My question is in part, are you going to be presenting works to the jury as groups, or are you planning to go one by one? I'm trying to picture how the trial can be four to five weeks.

MR. POMERANTZ: I think for statutory awards, we are assuming -- I believe the defendants are too in a way we've worked through jury instructions -- that there would simply be, these are the numbers of recordings that are subject to statutory awards. You pick a number between 750 and 150,000 dollars per award. I believe that is the way both of us have

set up our jury instructions.

MR. BAIO: That's the way the instructions are, your Honor. As a matter of evidence, I don't know what they plan on putting on as to one song as opposed to another, as an oldy as opposed to a newy, a word I just made up. But we'll have to see what is put before the jury to evaluate within individual works, but we did anticipate a number times the works, at least for statutory purposes.

THE COURT: Good. Thank you.

Do you have an answer on the availability of Mr. Von Lohrmann?

MR. MUNDIYA: Your Honor, we have e-mailed Mr. Von Lohrmann's counsel. He was getting on a plane. He will be there tomorrow. He has reached out but we don't have an answer yet. As soon as we do, we'll let your Honor know.

THE COURT: What do you think would be accomplished by having his lawyer here without him?

MR. MUNDIYA: To the extent your Honor has questions about the EFF conflicts, database and written records, he may be able to answer some of those questions, even though Mr. Von Lohrmann is not present.

He's going to be in New York anyway. He's not flying up especially for this.

THE COURT: Well, I understand that. I wouldn't want to hear him speculate, take hours of our time speculating. I'd

much rather have the fact witness here.

MR. MUNDIYA: OK. We're reaching out to him, your Honor.

THE COURT: Thank you.

MR. KLAUS: Your Honor, may I also ask that Mr. Mundiya also let us know as soon as he hears from Mr. Von Lohrmann whether --

MR. MUNDIYA: Of course.

THE COURT: Thank you.

Do counsel -- I'm sorry. Do you need to confer?

MR. POMERANTZ: That's OK.

THE COURT: Would it be possible for counsel to submit in writing your views on bifurcation?

MR. BAIO: Sure.

THE COURT: Or are they so simple that --

MR. BAIO: If you would like, your Honor.

THE COURT: Any authority would be helpful.

MR. BAIO: All right.

MR. POMERANTZ: That's fine, your Honor.

THE COURT: Apart from a matter dealing with equipment in the courtroom that my law clerk, Ms. Stein, will talk to you about, I don't have e-mails on have anything else on my agenda. Is there something you wish to raise today?

MR. POMERANTZ: Your Honor, there are a couple of matters that we have that we want to go over with your Honor,

but it probably makes sense to talk with defendant's counsel first to see whether we just have agreement and tell your Honor tomorrow whether we have or not. So I think I will defer on that until tomorrow if that's OK.

THE COURT: That's fine.

MR. MUNDIYA: One point of clarification if I may on Mr. Von Lohrmann, Mr. Von Lohrmann doesn't work for EFF anymore, he works for another company, which is part of the reason why we're having some logistical issues. I just want to make that clear. He is not currently at EFF. I apologize if I didn't make that clear.

THE COURT: I see. Perhaps, then, counsel for EFF could answer a question about what documents EFF now has.

MR. MUNDIYA: Right.

THE COURT: But Mr. Von Lohrmann could probably answer a question about what documents EFF maintained, for example, client lists, when he worked there.

MR. MUNDIYA: Understood, your Honor.

MR. POMERANTZ: Your Honor, I do have one question for your Honor. We are trying to figure out scheduling for next week, particularly for witnesses. And your Honor described the voir dire process. We didn't spend much time on it today. But I'm just wondering whether your Honor has a thought, given the kind of voir dire we're doing here, as to how long you think that would go. I know you had originally said you thought we

might be able to get voir dire done in the morning of the first day. Is that still your Honor's expectation?

THE COURT: Having read the voir dire in the *Tennenbaum* case and the answer jurors give, you'll note that I put in many more music industry-related questions than I initially had in mind. So I think it will take longer than I had in mind.

MR. POMERANTZ: That's what I was thinking too. So is it still your hope that we'll start openings the first day, or are you thinking that openings may start the second day?

THE COURT: I'd like for you to be ready to start the first day. I would say chances are 80 percent that we wouldn't get to it until the second day.

How long do you each expect to spend in your opening statements?

MR. POMERANTZ: Still working on it. But I would say it would be probably between an hour, an hour and a half.

THE COURT: That's quite a lot for an opening statement.

MR. POMERANTZ: I'm working on it.

THE COURT: Yes. I would definitely try to cut that back by half.

Mr. Baio?

MR. BAIO: I'm going to try to cut that back by half, your Honor.

One of the advantages of being the defendant.

THE COURT: One of the many.

MR. BAIO: I'm shooting for under 45 minutes.

THE COURT: OK. My law clerk, Ms. Stein, has volunteered to make up an agenda for tomorrow, which will be faxed to you. So we'll do that. And you can add anything you want.

MR. POMERANTZ: And I take it we are not going to be going through jury instructions tomorrow, from what your Honor said.

THE COURT: I've been trying to figure out how to deal efficiently with what you need to know before you open. If there are jury instructions as to which you must know the answer before you open to the jury, I would try to deal with them.

MR. POMERANTZ: I will discuss that. I would say that instructions 1 and 2 of ours, which overlap, I think, with instruction 2 of theirs, are ones that overlap with your Honor's ruling this morning on the in limine motions dealing with your summary judgment ruling. And I think that it would basically -- in large part we can rewrite our instruction no. 1 now based upon what your Honor is going to say to the jurors and we'll try to track the language there.

THE COURT: Yes.

MR. POMERANTZ: Instruction 2, as we have it, is

basically those facts that your Honor has established in your summary judgment ruling that you want to tell the jury about before the trial begins. And I think that that was one that you asked us to meet and confer and see if we can come up with a stipulated list.

THE COURT: Yes.

MR. POMERANTZ: And so we should do that. I would just want to know that before the opening, what those would be.

THE COURT: I'm sorry. I'm missing your point. You would want to know what my preliminary instruction to the jury will be?

MR. POMERANTZ: Will be with respect to which facts that you've already established you are going to tell the jury are established. I'm assuming it's a very small, few in number, but they're the ones that you believe would be most important for them to understand as to why you, why "the Court" has ruled the way it has. And so we would just want to clarify that one instruction before opening statements, so we know what we can say and can't say.

THE COURT: I did not have in mind as extensive an instruction as a preliminary instruction as your no. 2. Counsel will be revising your proposed instructions. When you do that for one such as Plaintiff's No. 2, I'll ask you to add a citation to where in the opinion you found the statement and whether what you have is a direct quote. We have very limited

resources. We need help there.

MR. POMERANTZ: All right. We will do that. I think that is the one instruction that we would like some guidance on before we start openings. I don't know that the others are essential before openings.

There may be one or two others, but we'll discuss it overnight and let your Honor know tomorrow.

THE COURT: OK. Now, in order for me to review submissions you make before we meet tomorrow, I think we had better set a schedule for your submissions.

We've set a schedule for what we dealt with this morning, but not yet with what we dealt with this afternoon.

What's left is the time by which you will get me letters on bifurcation and your intended stipulation of facts from the summary judgment motion. If you could have those to me by sometime tonight I could spend some of the morning getting ready to talk to you about them.

So what time is good for you?

MR. BAIO: I think the stunned silence is us evaluating the various tasks. And we really, it almost doesn't matter. We know there's going to be a lot of scurrying. So whatever works for your Honor.

THE COURT: Let's say 7 a.m. tomorrow.

MR. BAIO: OK.

THE COURT: And someone needs to be meeting with

clients also.

MR. BAIO: Yes, your Honor. We will do that.

THE COURT: So why don't we start at 11 tomorrow. And please save Monday for any overflow pretrial conference.

OK. Thank you very much.

MR. BAIO: Thank you, your Honor.

THE COURT: See you tomorrow at 11.

Please wait to talk to Ms. Stein.

(Adjourned to 11:00 a.m., April 27, 2011)